(3)

No. 00-493

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In The

Supreme Court of the United States

AUSTIN, NICHOLS & CO., INCORPORATED; et al.,

Petitioners,

v.

STATE OF GEORGIA; et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review a state trial court judgment involving a federal question where Petitioners failed to follow the State's discretionary appeal statute to seek a judgment by the highest state court in which a decision could be had?

2. Whether certiorari is precluded by adequate and independent state grounds, including the petitioning manufacturers' lack of standing to obtain a refund of taxes they have already collected from the liable wholesalers?

3. Whether a substantial federal question is properly presented on petition for certiorari where petitioners' alleged discriminatory purpose or effect Commerce Clause challenge to a State tax was based upon hearsay, unauthenticated documents, and other inadmissible evidence that was excluded by the trial court?

4. If certiorari is not precluded in this case, whether it is warranted to review a trial court decision upholding under the Twenty-first Amendment and the precedent of this Court, against a Commerce Clause challenge, Georgia's tax upon the importation of liquor into the State for use, consumption, or final delivery therein?

LIST OF PARTIES

Age International, Inc., Plaintiff

Austin, Nichols & Co., Incorporated, *Petitioner*/Plaintiff

Bacardi Imports, Inc., *Petitioner*/Plaintiff

The Black Prince Distillery, Inc., Plaintiff

Brown-Forman Corporation, *Petitioner*/Plaintiff

Carillon Importers Ltd., Plaintiff

Charles Jacquin Et Cie., Inc., Plaintiff

Collins, Marcus E., *Respondent*/Defendant

David Sherman Corporation, *Petitioner*/Plaintiff

E. & J. Gallo Winery, Plaintiff

The Fleischmann Distilling Company, a Division of Fourth Colchester, Inc., f/k/a Whitbread North America, Inc., Plaintiff

Fourth Colchester, Inc., f/k/a Whitbread North America, Inc., in its own right and as successor to Buckingham Wile Co., Plaintiff

Heaven Hill Distilleries, Inc., Plaintiff

Heublein, Inc., Plaintiff

Hiram Walker & Sons, Inc., in its own right and as successor to Hiram Walker Incorporated, also successor to Maidstone Wine & Spirits Inc., also successor to W.A. Taylor & Company, Plaintiff

Jim Beam Brands Co., *Petitioner*/Plaintiff

Joseph E. Seagram & Sons, Inc., Plaintiff

LIST OF PARTIES – Continued

McCoy, Steven N., *Respondent*/Defendant

Miller, Zell, *Respondent*/Defendant

The Paddington Corporation, Plaintiff

Remy Amerique, Inc., *Petitioner*/Plaintiff

Sazerac Company, Inc., Plaintiff

Schieffelin & Somerset Co., Plaintiff

Sidney Frank Importing Company, Inc., Plaintiff

Southern Wine & Spirits of America, Inc., d/b/a Shaw Ross International Importers, *Petitioner*/Plaintiff

State of Georgia, *Respondent*/Defendant

Vickers, Claude L., *Respondent*/Defendant

William Grant & Sons, Inc., Plaintiff

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition should be denied due to lack of jurisdiction, adequate and independent state grounds for the judgment, lack of a properly presented federal question, and a correct application by the trial court of this Court's precedent.

OPINIONS BELOW

The Georgia Supreme Court's unreported Order of June 30, 2000 states in full: "Upon consideration of the Motion to Dismiss filed in this case, it is ordered that this appeal be hereby dismissed." App. B.[1] The unreported Final Order of May 21, 1998 by the Superior Court of Fulton County is set out in Appendix A.

JURISDICTION

Petitioners do not make clear which Order is sought to be reviewed. The jurisdictional statement refers to the Georgia Supreme Court's Order dismissing the appeal (on procedural grounds), but their Petition patently addresses the Superior Court's Final Order. In any event, jurisdiction is wanting under 28 U.S.C. § 1257 due to the lack of a decision on any federal question by the highest state court in which a decision could be had, and by the

[1] Appendices A-U are attached to the Petition and Appendices 1-20 are attached to this Brief.

existence of independent and adequate state grounds for both Orders.[2]

STATUTES AND OTHER PROVISIONS INVOLVED

In addition to the constitutional provisions and Ga. L. 1985, p. 665 (Appendix N at N41-N44) appended to the Petition, the following are also involved and are appended hereto: GA. CONST. art. VI, § V, para. III; GA. CONST. art. VI, § VI, paras. II-V; Ga. L. 1992, p. 1458[3]; O.C.G.A. §§ 3-2-11, 3-2-13, 3-2-14, 3-4-61, 3-4-61 (pre-1992 version), 3-4-152, 5-6-35, 9-3-33, 9-11-26(b)(1) & (3), 9-11-56(e), 24-9-21(2), 24-9-24, 24-9-25; and 19 U.S.C. § 3512(b)(2)(A) & (c).

STATEMENT OF THE CASE

After *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) invalidated a Hawaii excise tax exemption for local alcohol products, Georgia repealed its 1938 liquor tax law[4]

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[2] Petitioners' failure to address known jurisdictional defects (alluded to in their Motion to Stay Remittitur below) cannot be remedied by a reply brief allegedly responding to new points. *See* U.S. Sup. Ct. R. 14.4 & 15.6.

[3] Petitioners' Appendix N at N21 is a Bill, not the 1992 Act.

[4] The 1938 law was subsequently held invalid. *James B. Beam Distilling Co. v. Georgia*, 259 Ga. 363, 382 S.E.2d 95 (1989) (*"Beam (Ga. I)"*) (prospectively invalid), *rev'd & remanded for consid. of remedial issues*, 501 U.S. 529 (1991) (retroactively invalid).

and enacted a new liquor tax system, imposing two distinct taxes: an excise tax on the first sale, use, or final delivery of distilled spirits; and the disputed tax on the importation of distilled spirits for use, consumption, or final delivery in the State. Ga. L. 1985, p. 665.

Heublein, Inc., a liquor manufacturer, immediately filed a declaratory judgment challenge to the 1985 Act on Commerce Clause, due process, and equal protection grounds. The tax was upheld, and this Court dismissed the appeal. *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190 (1987) (*"Heublein"*), *appeal dismissed*, 483 U.S. 1013 (1987).

Despite *Heublein*, in 1992 and 1993 Heublein, Inc. and other distilleries located outside Georgia filed administrative claims for refund with the Georgia Revenue Department for liquor taxes paid during 1988 through January 31, 1993, again asserting that the "import tax" in O.C.G.A. § 3-4-60(2) (Ga. L. 1985, p. 665) was invalid.

The two instant suits for refund were filed in Fulton Superior Court by those liquor manufacturers under O.C.G.A. §§ 48-2-35 and 3-2-14 after the Revenue Department refused to grant the refunds. *See* R-70-179 & 1439-1737, 9181-9286, 11321-571, 8934-35, 8968-71. The refund suits also included declaratory, injunctive, and other related claims for relief, all founded on the asserted invalidity of the tax under the U.S. and Georgia Constitutions. R-5-56, 1363-1752.[5]

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[5] An initially pled 42 U.S.C. § 1983 claim was shown by Respondents not to lie in this case. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989); *National Private Truck Council, Inc.*

After lengthy discovery, the State moved for summary judgment on the following facts in the Record.

Georgia Code Section 3-4-60 is both a revenue measure and an integral component of Georgia's current regulatory system to govern the importation and distribution of alcoholic beverages.[6] This tax component and the overall system combine to aid the State's control of alcohol. R-8923-28, 8954-55, 8959-60; *Heublein, Inc. v. Georgia*, No. D-20634, slip op. at 6 (Fult. Super. Sept. 23, 1985) (R-298-306), *aff'd*, 256 Ga. 578, 351 S.E.2d 190 (1987), *appeal dismissed*, 483 U.S. 1013 (1987).

It was unrebutted that the liquor imported into Georgia creates special problems – including bootlegging and contraband, and generates greater costs to the State, that the challenged tax (together with the general excise tax) promotes temperance, aids the State in regulating and controlling imported liquor, and helps recoup the State's greater costs. R-8964, 8923-28, 8937-51, 8954-55, 8959-60, 8906-07, 20829-30.[7]

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v. Oklahoma Tax Comm'n, 515 U.S. 582 (1995) and *Waldron v. Collins*, 788 F.2d 736, 738 (11th Cir. 1986), *cert. denied*, 479 U.S. 884 (1986); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Owens v. Okure*, 488 U.S. 235 (1989) and O.C.G.A. § 9-3-33.

[6] Georgia has historically been a "dry" state, in whole or in part. It currently has a partial-prohibition, three-tier system to regulate and control importation and distribution of alcohol, which may only be sold in a city or county after voter approval, with a license and under strict conditions. R-8923-24; *see* O.C.G.A. Title 3.

[7] While debating some cost factors, Petitioners admitted the overall greater costs vis-à-vis imported brands. R-11660. Reasons for the higher costs include: greater bootleg and

The 1985 Act itself and the Legislative Journals, where any true legislative history is found, show the concern over greater costs for imports and alcohol's adverse effects.[8] *E.g.*, H. Reg. Bevs. Comm. Minutes, 1985 Legis. Sess. (Ga. Feb. 11, 1985), R-20797; Ga. S. J. 1985, pp. 1446-55, 2125-28, R-20799-804.

Petitioners benefited from the State's use of the taxes to maintain a stable distribution system in "wet" areas, to provide exclusive sales territories for their products, and for other State protections. R-8925-28, 8937-51, 8906-07. *See* O.C.G.A. § 3-4-152. If the State were now required to refund these taxes, its governmental programs and services would suffer, while Petitioners would obtain a windfall – because they have already collected these taxes from the wholesalers (and received the other benefits from State use of the taxes). R-8906-07, 9071-81, 8925-32, 8937-51.

During the claim period, liquor taxes were administered by the sale of stamps by the Revenue Department.

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counterfeit problems, R-8938-39; greater costs to prevent brand competition in designated sales territories and to control unfair business practices, R-8939-40, 8945-46; greater volume of brands, licensees, and marketing combinations, R-8940, 8942; more travel routes into the State and unknown hours of arrival, R-8938; and higher expenses for auditing, travel, and other regulatory requirements, R-8940-45. *See also* R-8897-8901, 8927-28, 8937-53. Such costs are greater for imported alcohol in total and on a per liter basis. R-8951.

[8] The 1985 Act's stated purposes were "to provide for the increased cost of administration and collection of revenues; to aid in the exercise of the police power; [and] to promote temperance;" and it contained explicit findings as to the greater costs for regulating imported alcohol. Ga. L. 1985, p. 665.

R-8928. Either a wholesaler or manufacturer could purchase stamps, but when a manufacturer did so, it would then collect the tax from the Georgia wholesaler – the ultimately liable party. R-8928-29. Petitioners collected these taxes by billing their wholesalers for "state stamps," "State tax," or the like. R-6186-88, 9745-11311, 8929-31, 8983-9068.[9]

The Superior Court entered summary judgment for the State, ruling that Petitioners lack standing to obtain the refund sought and that the tax is constitutional under the Twenty-first Amendment and *Heublein*. App. A.

Twelve (12) of the 23 Plaintiffs appealed, by filing a direct appeal to the Georgia Supreme Court, which the State moved to dismiss solely for failure to comply with the discretionary appeal statute, O.C.G.A. § 5-6-35. R-1; Mot. to Dismiss Appeal. No federal issue was raised in opposition to that motion, which was granted on June 30, 2000. No motion for reconsideration was filed. A motion to stay remittitur was granted on July 17, 2000. The petition for certiorari by 7 Plaintiffs was docketed in this Court on October 3, 2000.

Response To Petitioners' Statement Of The Case

The evidence does not support the asserted history, statements, intent, or action by putative legislators, State officials, and others set out (without supporting cites) at pages 2-6, 15-16, and elsewhere in the Petition; such

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[9] This fact situation will not recur. Liquor taxes are now collected exclusively from wholesalers through a reporting system. *See* O.C.G.A. § 3-4-61. Thus, manufacturers no longer buy tax stamps or collect liquor taxes from the wholesalers.

assertions are Petitioners' own argued, but unproven views. Their proffered informal audiotapes of purported legislator statements – and edited transcript thereof (adding names and document references as they chose) from which they quote in the Petition – were neither authenticated nor reliable. The trial court properly excluded such "evidence" and other inadmissible documents. *See, e.g., Steve M. Solomon, Jr., Inc. v. Edgar*, 92 Ga. App. 207, 211-12, 88 S.E.2d 167, 171 (1955); Final Order, App. A at A14-15; R-21166-68, 20720, 20661-733.[10]

The "extensive evidentiary materials," Pet. at 14, offered to oppose the State's summary judgment motion were mainly boxes of State budget records, which supported Movants' explanation of the costs incurred by the many relevant State (and local) agencies. *See* R-8946-51, 12814-20660.

Petitioners' current law firm also represented them in *Heublein* and the other prior alcohol suits. Their misleading comments regarding *Beam (Ga. II)*[11] and *Reich II*[12] wrongly indicate that the error reversed in *Reich II* was present in, and that any new procedural bar was applied in, *Beam (Ga. II)*. This Court reversed *Reich II* for trying to read the refund statute to exclude certain constitutional

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[10] Also, Petitioners mix putative remarks (which cannot be tied to any version of a Bill or passed Act) about the 1938 law with purported 1985 debate over new bills. They also wrongly imply that *Beam (Ga. I)* (invalidating the 1938 law) related to the 1985 law.

[11] *James B. Beam Distilling Co. v. Georgia*, 263 Ga. 609, 437 S.E.2d 782 (1993) ("*Beam (Ga. II)*"), *cert. denied*, 513 U.S. 1056 (1994).

[12] *Reich v. Collins*, 263 Ga. 602, 437 S.E.2d 320 (1993) ("*Reich II*"), *rev'd*, 513 U.S. 106 (1994).

challenges, but *after* deciding *Reich II* denied certiorari in *Beam (Ga. II)* which had found (as have Georgia's other post-*Reich II* cases) the refund statute available.[13]

As the Record and trial court decision show, Petitioners *failed* to "demonstrate[] that the finding [by the Legislature of greater regulatory costs] was false," Pet. at 22; the evidence *proved* the higher costs.[14] Respondents never indicated that the per liter cost was less for out-of-state beverages; the evidence was directly to the contrary. *E.g.*, R-8951, 15286-90.

The trial court wrote and rendered its own order. The GATT matter, discussed *infra*, did *not* involve O.C.G.A. § 3-4-60. And no issue is presented to this Court as to the 1992 Act.[15]

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[13] *Compare Reich v. Collins*, 263 Ga. 602, 437 S.E.2d 320 (1993) ("*Reich II*"), *rev'd*, 513 U.S. 106 (1994), *with James B. Beam Distilling Co. v. Georgia*, 263 Ga. 609, 610 n.3, 437 S.E.2d 782, 784 n.3 (1993) ("*Beam (Ga. II)*"), *cert. denied*, 513 U.S. 1056 (1994). And in *Beam (U.S.)* this Court protected a State's normal procedural bars to refund suits, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991).

[14] *E.g.*, Final Order, Finding of Fact No. 6: "The State incurs greater expenses in regulating imported alcoholic beverages than domestic alcoholic beverages," App. A at A6; R-8897-8901, 8927-28, 8937-53 (explaining many reasons for the higher costs, such as greater contraband problems), 14848-52 (monitoring and auditing; distance; number of shipments), 14921-27 (greater volume, brands, licensees, processing costs; multiple divisions and agencies needed), 15209-10 & 15286-90, 15212-17 (auditors sent around U.S.).

[15] But States *can* protect their fisc through shorter statutes of limitation. Further, the 1992 Act was refined in 1993 to add the refund option. *See* O.C.G.A. § 3-2-13(c).

REASONS FOR DENYING THE WRIT

A. Petitioners' Failure To Seek Discretionary Review By The Georgia Supreme Court Deprives This Court Of Jurisdiction.

Title 28 U.S.C. § 1257(a) limits this Court's review to the judgment of the highest State court in which a decision could be had.

In this suit for refund raising federal and state constitutional questions, the Georgia Supreme Court was the highest State court in which a decision could have been had.[16] Review of the trial court's judgment was available by application for discretionary appeal; but Petitioners failed to file such an application, thereby waiving the opportunity for a State Supreme Court decision and depriving this Court of jurisdiction. *See, e.g., John v. Paullin*, 231 U.S. 583, 585-87 (1913) (no jurisdiction where State Supreme Court did not pass upon any ruling below because its appellate jurisdiction was not invoked in accord with state law; "[T]he case stands as though no appeal had been prosecuted from the judgment rendered by the trial court" [internal quotes omitted]).[17] To avoid such lack of jurisdiction, in their Motion to Stay Remittitur below Petitioners cited inapplicable decisions of this

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[16] *See* GA. CONST. art. VI, § VI, para. II.

[17] *See also Banks v. California*, 395 U.S. 708 (1969); *Hammerstein v. Superior Ct. of Calif.*, 341 U.S. 491 (1951); *Gorman v. Washington Univ.*, 316 U.S. 98, 100-01 (1942); *McMaster v. Gould*, 276 U.S. 284 (1928); *Southern Elec. Co. v. Stoddard*, 269 U.S. 186, 188-90 (1925); *Stratton v. Stratton*, 239 U.S. 55, 56-57 (1915) (no jurisdiction where appellant failed to seek discretionary review by State Supreme Court).

Court rejecting "arbitrary" state procedural devices used to thwart review of a federal question.[18]

Georgia Code Section 5-6-35(a)(1) has long been held to require that appeals from superior court decisions reviewing state administrative agency decisions and the proceedings leading to such decisions be by application for discretionary review, regardless of whether declaratory, injunctive, or other claims are also brought.[19] The statute has consistently been applied to decisions reviewing administrative tax proceedings, including Superior Court review of tax assessments and of claims for refund of taxes.[20]

Here, Petitioners' administrative claims for refund were denied by operation of law one year (or sooner for

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[18] *E.g., Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917) (but, "where the non-federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it").

[19] *E.g., Prison Health Servs., Inc. v. Georgia Dep't of Admin. Servs.*, 265 Ga. 810, 811, 462 S.E.2d 601, 603 (1995); *Miller v. Georgia Dep't of Pub. Safety*, 265 Ga. 62, 453 S.E.2d 725 (1995); *Rebich v. Miles*, 264 Ga. 467, 448 S.E.2d 192 (1994); *Tri-State Bldg. & Supply, Inc. v. Reid*, 251 Ga. 38, 302 S.E.2d 566 (1983); *Rankin v. Composite State Bd. of Med. Exam'rs*, 220 Ga. App. 421, 469 S.E.2d 500 (1996).

[20] *E.g., Olin Corp. v. Collins*, 261 Ga. 849, 413 S.E.2d 193 (1992) (suit for refund under O.C.G.A. § 48-2-35); *Miles v. Collins*, 259 Ga. 536, 384 S.E.2d 630 (1989) (appeal to superior court from tax assessment); *Plantation Pipe Line Co. v. Strickland*, 249 Ga. 829, 294 S.E.2d 471 (1982) (same); *Wheeler v. Strickland*, 248 Ga. 85, 281 S.E.2d 556 (1981) (same); *Bankers Trust Co. v. Jackson*, 236 Ga. App. 490, 512 S.E.2d 378 (1999) (suit for refund of taxes); *C. W. Matthews Contracting Co. v. Collins*, 210 Ga. App. 1, 435 S.E.2d 221 (1993) (same).

some under Ga. L. 1992, pp. 1458, 1464-65) after their filing with the Revenue Department. *See* O.C.G.A. §§ 48-2-35, 3-2-14; *Hawes v. Shepherd Constr. Co.*, 117 Ga. App. 842, 844-45, 162 S.E.2d 231, 233 (1968). Indeed, that was the prerequisite for bringing the instant suits for refund prior to affirmative action by the Revenue Commissioner. *See* O.C.G.A. §§ 48-2-35(b)(4), 3-2-14(b).

The administrative claims were reviewed and audited by the Department, with additional audit work being done after the refund suits were filed.[21] R-8936. In addition to *Heublein*'s having previously upheld the tax, the Department's audit also found that the claims contained "duplication, miscalculations, and mathematical errors" and other flaws and omissions. *E.g.*, R-8936. Thus, the Department determined that the claims were without merit and could not be granted, although Petitioners filed their suits for refund prior to issuance of a written denial. Pursuant to the refund statutes, the suits were filed at the point in time when the administrative claims were denied by operation of law, to seek Superior Court review of the Department's refusal to grant the refund claims. *See* R-16-17, 1370-73.

Petitioners attached the refund claims to their Complaints and presented such matters to the court for judicial review, which subsequently involved (on motion for summary judgment) a full legal and factual review of the refund claims, of the asserted unconstitutionality of the

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[21] For this group, the Department had to audit 94 claims by 26 companies involving many thousands of manufacturer/wholesaler transactions over a 5-year period. *E.g.*, R-70-179, 1439-1737, 9749-11311.

tax (which was the legal basis for the claims), and of Petitioners' contention that the claimed refunds should be granted. R-70-179, 1439-1737, 8721-9286, 9741-11312, 8968-71. The Superior Court reviewed and resolved the merits of the refund claims in its Final Order, by granting the State's motion for summary judgment and by finding no merit to the grounds asserted for the refund claims and that the other defenses thereto also barred the requested refunds. App. A. Notable among the bars was the fact that claimants had already recovered from the wholesalers the taxes for which they were seeking a refund, R-6186-88, 8929-31, 8983-9068, 9745-11311, and thus lacked standing to recover again from the State, App. A at A5, A13-A14.

The 1992 amendment to the Alcohol Code reinforces the applicability of the discretionary appeal statute. Previously, there was a potential question as to whether the general refund statute in the Revenue Code, Section 48-2-35, or the one in the Alcohol Code, Section 3-2-14, was controlling vis-à-vis refund claims for alcohol taxes.[22] The 1992 Act clarified that the Alcohol Code would henceforth be controlling. To effectuate a prompt transition, the Act directed that, if no suit for refund or credit had yet been filed on pending alcohol tax claims, then any such action was to be brought within 90 days from the effective date of the Act. Thus, that Act reinforced the legal result that pending claims for credit or refund of alcohol taxes, which had not previously been granted by the Commissioner, were denied by operation of law within (either the one year period otherwise

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[22] Petitioners sued for refund under both provisions.

provided by Sections 48-2-35 and 3-2-14 or) the 90 day transition period prescribed by the 1992 Act. *See* Ga. L. 1992, pp. 1458, 1464-65.

The 1992 Act applied to all alcohol tax claims for credit or refund, and to both affirmatively denied claims and claims denied by operation of law. After the Act's passage, but prior to its effective date, Petitioners made the instant new filings of administrative claims for refund, to specifically time their claim options according to the law (that was in effect at a given time) which they preferred. *See* R-8968, 9181-9286, 11321-572. Nevertheless, under both prior and current law applicable to Petitioners' claims, the denial by operation of law was dispositive here.

The *Beam* case[23] argued below (*see* App. U) does not aid Petitioners, as no discretionary appeal issue was raised therein. That an appellee in a prior case missed this defense does not change the Georgia courts' consistent application of the law whenever the issue has been raised. Also, the filing of a cross-appeal in *Beam* is irrelevant to the propriety of the initial appeal therein; and which appellate court has subject matter jurisdiction under Georgia's Constitution is distinct from the procedure for pursuing an appeal.[24]

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[23] *James B. Beam Distilling Co. v. Georgia*, 259 Ga. 363, 382 S.E.2d 95 (1989) (*"Beam (Ga. I)"*), *rev'd & remanded for consid. of remedial issues*, 501 U.S. 529 (1991).

[24] *City of Atlanta Bd. of Zoning Adjustment v. Midtown North, Ltd.*, 257 Ga. 496, 497 n.1, 360 S.E.2d 569, 570 n.1 (1987). *Compare* GA. CONST. art. VI, § V, para. III, *with* GA. CONST. art. VI, § VI, paras. II-V.

The fact situations in the cases Petitioners cited below (*see* App. U) were different from the instant non-ad-valorem-tax refund situation. In the Revenue Code and Alcohol Code refund provisions, the Legislature prescribed the one year period to both provide substantial time for administrative review of a State tax claim and so that at the end of said year such claim, if not granted within that time, would be deemed denied as a matter of law so as to authorize judicial review. In such instance, where the Superior Court does thereafter receive and resolve a suit for refund – as was done here, the discretionary appeal statute is applicable.

Therefore, under state law the Georgia Supreme Court properly granted the motion to dismiss for failure to comply with the discretionary appeal statute. Further, that court's decisions on the merits in the earlier challenges to both Georgia's prior and current alcohol tax statutes belie any argument that such court has "thwarted" review of these very federal questions.[25]

Petitioners' failure to present their federal questions to the Georgia Supreme Court by application for appeal deprives this Court of jurisdiction to review the trial court's judgment.[26]

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[25] *See Heublein*, 256 Ga. 578, 351 S.E.2d 190 (upholding current alcohol tax statute), *appeal dismissed*, 483 U.S. 1013; *Beam (Ga. I)*, 259 Ga. 363, 382 S.E.2d 95 (holding 1938 alcohol tax statute prospectively invalid), *rev'd & remanded*, 501 U.S. 529.

[26] Such failure can also be viewed in terms of waiver and as an independent and adequate state ground (see next section of this Brief) for the resulting final Superior Court judgment. *See Ellis v. Dixon*, 349 U.S. 458, 462 n.5 (1955); *Edelman v. California*,

B. The Judgment Was Based Upon Adequate And Independent State Grounds, Including Lack Of Standing To Obtain A Refund Of Taxes Already Collected From The Wholesalers.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). *See also Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

While Petitioners may want to recharacterize this lawsuit, the gravamen of the action was a suit for refund or credit of liquor taxes. The state grounds for the trial court's judgment included these manufacturers' lack of standing to obtain a refund of taxes which their wholesalers had already repaid to Petitioners to satisfy the

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344 U.S. 357, 361-62 (1953); *Parker v. Illinois*, 333 U.S. 571, 575-76 (1948). The discretionary appeal statute furthers legitimate State interests in the administration of the courts and control of judicial resources. *Cf. O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 848 (1999); *Lindsey v. Normet*, 405 U.S. 56, 78 (1972) ("We do not question here reasonable [appellate] procedural provisions").

This Court also lacks jurisdiction to review the Georgia Supreme Court's dismissal Order, because it addressed no federal question; it was based upon established law applying the State's discretionary appeal statute to cases of judicial review of administrative tax proceedings. *Cf. Webb v. Webb*, 451 U.S. 493, 495-502 (1981).

wholesalers' own tax liability. Under Georgia law, it is well established that when a vendor who remits a tax to the State has collected it from another party, the vendor does not have standing to recover the tax in a refund action against the State. *See James B. Beam Distilling Co. v. Georgia*, 263 Ga. 609, 437 S.E.2d 782 (1993) ("*Beam (Ga. II)*"), *cert. denied*, 513 U.S. 1056 (1994).[27] *See also* O.C.G.A. § 3-2-13(b) ("No person shall receive a credit for taxes paid or stamps purchased . . . where an amount equal [there]to . . . has been charged to or paid by any purchaser of the person seeking a refund or credit").[28]

Ultimate liability for Georgia's liquor taxes has always been on the wholesaler, whatever the arrangement between the manufacturer and wholesaler for purchasing and affixing tax stamps. *See* O.C.G.A. §§ 3-2-11(2), 3-4-61, 3-4-61(a)(2) (pre-1992 version). When a manufacturer would purchase and affix stamps prior to

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[27] *Accord Eimco BSP Services Co. v. Chilivis*, 241 Ga. 263, 268, 244 S.E.2d 829, 832 (1978); *Blackmon v. Georgia Indep. Oilmen's Ass'n*, 129 Ga. App. 171, 174-75, 198 S.E.2d 896, 899-900 (1973); *Blackmon v. Premium Oil Stations, Inc.*, 129 Ga. App. 169, 170, 198 S.E.2d 900, 902 (1973). *See also Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295, 149 S.E.2d 691 (1966).

[28] The Georgia rule is similar to that under federal refund statutes, upon which O.C.G.A. § 48-2-35 was modeled. *See Hawes v. Bigbie*, 123 Ga. App. 122, 122, 179 S.E.2d 660, 661-62 (1970); *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 400, 402-03 (1934) ("We cannot assent to the view that a court may . . . award[] the taxpayer a refund without inquiring whether he has borne the burden of the tax or has reimbursed himself by collecting it from the purchaser"); *Travel Indus. of Kansas, Inc. v. United States*, 425 F.2d 1297, 1300 (10th Cir. 1970); *Sharp & Dohme, Inc. v. United States*, 144 F.2d 456, 458-59 (3d Cir. 1944).

shipment to the Georgia wholesaler, the manufacturer was the State's agent in collecting the tax from the wholesaler. The price of the alcohol product to the wholesaler did not change, and the wholesaler did not pay the tax to acquire the goods, but to satisfy its own tax liability. Thus, when "the manufacturer remits tax payment to the revenue commissioner and subsequently, in an itemized billing statement, requires the wholesaler to remit payment for 'state stamps' or 'state tax,' it is the wholesaler which is the taxpayer," and the manufacturer lacks standing to obtain the tax from the State. *Beam (Ga. II)*, 263 Ga. at 611, 437 S.E.2d at 784.

Petitioners recovered the claimed taxes from their wholesalers in that manner. R-6186-89, 8929-31, 8983-85, 9745-11311, 8989-9015. Thus, Petitioners were not the "taxpayer" and "lack standing to obtain a refund from the State of the taxes in question, because they have already recovered them from the liable parties, *i.e.*, the Georgia wholesalers." Final Order, App. A at A13-14; O.C.G.A. §§ 48-2-35(a), 3-2-13(b).[29]

In addition, portions of these refund claims were barred by the State's three-year statute of limitations. *See* O.C.G.A. § 48-2-35(b)(1); Ga. L. 1992, pp. 1458, 1464-65; R-8934-35, 8968, 11321-572.

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[29] The standing bar serves legitimate State interests, including protection of the public treasury against claims that would result in unjust enrichment. It does not preclude recovery for absorbed taxes, but only for taxes collected by the seller from the ultimately liable purchaser, thus preventing a double recovery of the taxes by a seller.

Therefore, the judgment for the State in this suit for refund rests on adequate and independent state grounds. *See also DeSaussure v. Gaillard*, 127 U.S. 216, 232-34 (1888).

C. The Asserted Federal Questions Are Not Properly Presented By The Facts In The Record.

"This Court has often refused to decide constitutional questions on an inadequate record," *Ellis v. Dixon*, 349 U.S. 458, 464 (1955), and will "not grant a certiorari to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925).

The heart of this refund suit was Petitioners' renewed Commerce Clause argument that the Georgia tax had a discriminatory purpose or effect. However, their proffered evidence to support such allegation was inadmissible and was excluded by the trial court as hearsay, unauthenticated documents, or otherwise inadmissible. *See* O.C.G.A. § 9-11-56(e) ("opposing affidavits shall . . . set forth such facts as would be admissible in the evidence"); *Butler v. Bolton Rd. Partners*, 222 Ga. App. 791, 794, 476 S.E.2d 265, 267 (1996) ("hearsay evidence, unsupported conclusions, and the like, must be stricken or eliminated from consideration in a motion for summary judgment").[30]

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[30] Due to Petitioners' waiver of proof, *all* excluded documents lacked authentication; they were also hearsay and each inadmissible for further reasons (like attorney-client privilege, work product, conclusions, etc.). *See, e.g.*, R-20720, 21467-68; O.C.G.A. §§ 24-9-21(2), 24-9-24, 24-9-25, 9-11-26(b)(1) & (3); *Achor Ctr., Inc. v. Holmes*, 219 Ga. App. 399, 401, 465 S.E.2d 451, 454 (1995) (unauthenticated transcript may not be

As to their other federal arguments against the tax, Petitioners either had no evidence or also offered inadmissible, excluded evidence.

Therefore, since the Record is inadequate to support Petitioners' arguments, the asserted federal questions are not properly presented to this Court for review.[31]

D. The Trial Court Correctly Upheld The Tax Under The Twenty-First Amendment And This Court's Precedents.

The Georgia tax is a valid exercise of core Twenty-first Amendment State powers.[32] That Amendment particularly limits the Commerce Clause as to alcohol imported into a State. *E.g., State Bd. of Equal. of Calif. v. Young's Market Co.*, 299 U.S. 59, 62-63 (1936) ("Can it be doubted that a State might . . . discourage importation by laying a

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considered on summary judgment). The hazards of considering such "evidence" were apparent. Petitioners' purported legislative tapes and edited transcripts thereof were unofficial, unverified, and involved only portions of alleged debates in the Georgia House (and not the Senate) in 1985.

[31] Petitioners' failure to satisfy basic rules of evidence is also a supporting, adequate and independent ground for the trial court's rejection of the constitutional arguments, all of which were founded upon unproven factual allegations. *See, e.g.*, App. A at A14-A15; R-20720.

[32] Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

heavy impost[?]"; upholding State fee for privilege of importing alcohol).

The import tax implicates central concerns of the Twenty-first Amendment, and thus outweighs any "dormant" Commerce Clause considerations. *Heublein*, 256 Ga. at 584-85, 351 S.E.2d at 195-96 (reviewing this very tax and applying U.S. Supreme Court's precedents), *appeal dismissed*, 483 U.S. 1013. *See also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516, 532 (1996) (Twenty-first Amendment limits dormant Commerce Clause's effect on State's "power over the delivery or use of intoxicating beverages within its borders"); *United States v. Frankfort Distilleries*, 324 U.S. 293, 299-300 (1945) (Amendment grants State "full authority to determine the conditions upon which liquor can come into its territory").[33]

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[33] *See also North Dakota v. United States*, 495 U.S. 423, 431 (1990) ("within its . . . jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor"); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984) (States have "power to impose burdens on interstate commerce in . . . liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause"); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980) ("Amendment gives the States control over the 'transportation or importation' of liquor into their territories. . . . We should not . . . lose sight of the explicit grant of authority"); *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 283 (1972) ("a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders" [internal quotes omitted]).

In contrast to the Hawaii law held invalid in *Bacchus* because it was enacted solely for protection of local products, the Georgia Act was enacted to provide for the increased costs of alcohol regulation, to aid in the exercise of the police power, and to promote temperance. Ga. L. 1985, p. 665; *Heublein*, 256 Ga. at 582-85, 351 S.E.2d at 194-96. It was also based upon express legislative findings of greater State costs for imported alcohol. Ga. L. 1985, p. 665; *Heublein*, 256 Ga. at 584-85, 351 S.E.2d at 195-96.

Petitioners' assertion of a "tainted" motive by a lobbyist or individual legislator, and disagreement with the legislative findings, is negated by the Act itself and the actual evidence (cited *supra*). Moreover, even where an improper motive is alleged, a State alcohol statute is valid when it implicates a Twenty-first Amendment concern. *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 203-04 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997). *See also Bacchus*, 468 U.S. at 275-76; *Lanier v. City of Newton*, 842 F.2d 253, 256 n.3 (11th Cir. 1988).

Also, in Commerce Clause and equal protection analysis "this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7, 471 n.15 (1981) (internal quotes omitted).[34] More broadly,

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[34] The Court further noted: "We will not invalidate a state statute . . . merely because some legislators sought to obtain

> [i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.

United States v. O'Brien, 391 U.S. 367, 383-84 (1968).[35]

Further, the instant tax helps recover the increased costs generated by the imported liquor. *See Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 101 n.5 (1994). Petitioners disagree with the amount of the tax, but that is a matter of legislative inquiry concerning the mere rate of the tax. *E.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 620-21, 627 & n.16 (1981). And, since the tax only applies to importation for use in Georgia, its relationship to local activities is more than ample. *See id.* at 625-26; *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 199-200 (1995).

The foreign Commerce Clause argument is also without merit, and it, too, was factually and legally rebutted

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votes for the measure on the basis of its beneficial side effects on state industry." *Id. See also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . [A] legislative choice is not subject to courtroom factfinding").

[35] *Accord Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949) ("It is said that the 'insurance lobby' obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality").

in Respondents' summary judgment motion. *E.g.*, R-8721-9286, 9741-11312, 8940-41 (Petitioners' brands sold in Georgia came from U.S. warehouses). Petitioners had no factual response. *See Cagle v. Davis*, 236 Ga. App. 657, 659, 513 S.E.2d 16, 19 (1999) (in response to summary judgment motion, plaintiff must present contravening evidence or suffer judgment). They merely asserted the two foreign Commerce Clause considerations, *see, e.g., Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 74-76 (1993); but since the Section 3-4-60(2) tax is imposed only with respect to goods coming to rest in Georgia, it cannot generate multiple taxation on the same transaction, nor does it prevent the federal government from speaking with one voice. *See also Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) (tax that "merely has foreign resonances" not invalid). Moreover, the Twenty-first Amendment expressly empowers the States to control the importation of alcohol therein, and Georgia is the only State that *can* tax "importation" into its territory for consumption there. *Cf. Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. at 184-85 (upholding sales tax on local sale of bus ticket for interstate travel).

In addition, the equal protection (and a due process) argument was rejected in *Heublein*. *See also Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938). Section 3-4-60(2) is both regulatory and economic in scope, and is rationally related to a legitimate purpose. *See Heublein, supra. See generally Madden v. Kentucky*, 309 U.S. 83, 87-90 (1940). And Georgia provides many governmental benefits to these liquor manufacturers, including exclusive sales territories and specific protections for their registered brands. R-8923-28, 8937-51, 8956, 8960; O.C.G.A.

§ 3-4-152. *See Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444-45 (1940).

While effectively abandoned below, the assertion about a Canada-U.S. trade dispute is incorrect and irrelevant. The purported ruling under the General Agreement on Tariffs and Trade ("GATT") did *not* address O.C.G.A. § 3-4-60; and federal law negates usage of the GATT by a private party to challenge a State law, 19 U.S.C. § 3512(b)(2)(A) & (c). Further, no GATT panel ruling could override the Twenty-first Amendment of the U.S. Constitution.[36]

E. There Is No Merit To Petitioners' Other Arguments.

The arguments to avoid the Twenty-first Amendment and to posit conflicting decisions or new "subsidiary" issues for this Court to resolve are without merit. As shown therein, *Ivey v. Bacardi Imports, Co.*, 541 So.2d 1129 (Fla. 1989) involved a Florida law different from Georgia's 3-4-60 and not limited to importation for use, consumption, or final delivery into the State like Section 3-4-60; and its stated purposes did not include promoting

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[36] While the grounds in the text are sufficient to negate Petitioners' constitutional arguments, if certiorari were to be granted then the State will also show that under both the language and the history of the Twenty-first Amendment *Bacchus* was wrongly decided and that there is no "dormant" or "negative" Commerce Clause restriction upon a State's laws pertaining to alcoholic beverages within its territory. *See also* U.S. CONST. amend. X.

temperance nor aiding State police power – core Twenty-first Amendment concerns. The local alcohol industry situation and regulatory system were different, and there was no indication of greater costs to control imports, and no distinct problems caused by them. Here, the uncontradicted evidence showed the massive bootleg, contraband, and other greater (and greater cost-producing) problems caused in Georgia by the imports. *E.g.*, R-8964, 8937-51, 8923-28, 8954-56, 8960, 20822-25, 20828-30.[37]

Further, there was no decision here by the Georgia Supreme Court on any federal question; and Petitioners' effort to pit the prior *Ivey* decision against the prior *Heublein* decision is not an appropriate basis for certiorari in the instant case. Similarly, the cited decisions of the Federal Courts of Appeals are neither reviewable nor in need of review in the instant case.[38] This Court does not

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[37] While not relevant in the Twenty-first Amendment context, it is noteworthy that there is no adequate lesser alternative to the Georgia import tax. R-8954-56; *cf. Maine v. Taylor*, 477 U.S. 131, 138 (1986). The only other means of alleviating the special problems and costs caused in Georgia by the imports would be to ban them in part or in whole – which would, also, be authorized by the Twenty-first Amendment, but be an infinitely greater burden than the tax. *See Department of Rev. v. James B. Beam Distilling Co.*, 377 U.S. 341, 346 (1964) ("We have no doubt that under the Twenty-first Amendment [the State] could . . . completely prohibit the importation of some intoxicants, or of all intoxicants").

[38] *Bridenbaugh v. Freeman-Wilson*, Nos. 00-1044 & 00-1046, 2000 U.S. App. LEXIS 22991 (7th Cir. Sept. 13, 2000) upheld a restriction on wine shipments from outside the State directly to unlicensed consumers. *Kronheim*, discussed in the text *supra*, upheld a local warehousing requirement. While Respondents disagree with *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994),

render advisory opinions. *Coleman v. Thompson*, 501 U.S. at 729; *Conway v. California Adult Auth.*, 396 U.S. 107 (1969).

The cases in footnotes 14 and 16, such as *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) and *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), cited for means of examining the purpose of a State statute challenged under the Commerce Clause and in a Twenty-first Amendment context, do not help Petitioners. Not only did the 1985 Georgia Act show its purposes, but Respondents also proved that the legislative findings were correct and that the Act furthered the stated Twenty-first Amendment purposes. For both jurisprudential and evidentiary reasons, Petitioners' excluded evidence, consisting mainly of unauthenticated, alleged individual legislator statements, could not refute the Act's stated purposes and proven substance. Under existing precedent, and under any theoretical standard Petitioners posit, the trial court's decision was correct; and their asserted uncertainty about how to pursue a Commerce Clause challenge is abstract. That the trial court did not recite Petitioners' analytical approach in its order does not affect the correctness of its ruling.

The other cited alcohol cases involved issues of competing federal regulatory power over commerce or other statutes and situations different from Georgia's.[39] Further, Georgia's statute is unrebuttedly supported by the

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which invalidated a particular residency requirement for an alcohol license, it, too, provides no basis for granting certiorari.

[39] *E.g.*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), finding State ban on cable TV alcohol advertising pre-empted by federal law regulating national cable systems; and *Healy v.*

additional purpose of promoting temperance. Ga. L. 1985, p. 665; R-8925-27, 8954-55, 8959-60, 20829-30.

There is no merit to the other *implied* issues:

1. While subsection (3) of O.C.G.A. § 3-4-60, relating to spirits manufactured in Georgia for sale there, is constitutional, Petitioners failed to show injury from or standing to challenge that provision; and after Respondents moved for summary judgment, Petitioners essentially abandoned that issue, failing to factually and legally support it or to obtain a ruling on it – which negates their argument now. *Cf. Street v. New York*, 394 U.S. 576, 581-82 (1969); *Cramp v. Board of Pub. Instruction of Orange County*, 368 U.S. 278, 282-83 (1961); *Hambrick v. B. G. Swing Games Mgmt., Inc.*, 267 Ga. 597, 481 S.E.2d 816 (1997).

2. The tax is not a prohibited "impost" under the Import-Export Clause. *See Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). Respondents showed below how such issue had no factual or legal merit. *E.g.*, R-8721-9286, 9741-11312, 8940-41. Again, Petitioners had no factual response. *See Cagle v. Davis*, 236 Ga. App. at 659, 513 S.E.2d at 19. They only asserted the policy considerations under such Clause, which are not violated here. *See Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. at 76-77; *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984). The

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Beer Inst., Inc., 491 U.S. 324 (1989) and *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), involving State laws restricting alcohol prices *outside* the State. But the Twenty-first Amendment "gives the States wide latitude to regulate the importation and distribution of liquor within their territories." *Brown-Forman*, 476 U.S. at 584.

tax incidence occurs at the wholesale tier inside the State, R-8928-29, O.C.G.A. § 3-4-61; and, as discussed earlier, the tax is also authorized by the Twenty-first Amendment.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 00-493

In The

Supreme Court of the United States

AUSTIN, NICHOLS & CO., INCORPORATED; BACARDI IMPORTS, INC.; JIM BEAM BRANDS CO.; BROWN-FORMAN CORPORATION; DAVID SHERMAN CORPORATION; REMY AMERIQUE, INC.; and SOUTHERN WINE & SPIRITS OF AMERICA, INC., d/b/a Shaw Ross International Importers,

Petitioners,

v.

STATE OF GEORGIA; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Deputy Commissioner of the Administration Division of the Department of Administrative Services and as Director of the Fiscal Division of the Department of Administrative Services and as State Treasurer for the State of Georgia,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX 1

GA. CONST., Art. VI, Sec. V, Para. III. Jurisdiction of Court of Appeals; decisions binding.

The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law. The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents.

APPENDIX 2

GA. CONST., Art. VI, Sec. VI, Para. II. Exclusive appellate jurisdiction of Supreme Court.

The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases:

(1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question; and

(2) All cases of election contest.

APPENDIX 3

GA. CONST., Art. VI, Sec. VI, Para. III. General appellate jurisdiction of Supreme Court.

Unless otherwise provided by law, the Supreme Court shall have appellate jurisdiction of the following classes of cases:

(1) Cases involving title to land;

(2) All equity cases;

(3) All cases involving wills;

(4) All habeas corpus cases;

(5) All cases involving extraordinary remedies;

(6) All divorce and alimony cases;

(7) All cases certified to it by the Court of Appeals; and

(8) All cases in which a sentence of death was imposed or could be imposed.

Review of all cases shall be as provided by law.

APPENDIX 4

GA. CONST., Art. VI, Sec. VI, Para. IV. Jurisdiction over questions of law from state or federal appellate courts.

The Supreme Court shall have jurisdiction to answer any question of law from any state or federal appellate court.

APPENDIX 5

GA. CONST., Art. VI, Sec. VI, Para. V. Review of cases in Court of Appeals.

The Supreme Court may review by certiorari cases in the Court of Appeals which are of gravity or great public importance.

APPENDIX 6

Ga. Laws 1992, pp. 1458-1465.

ALCOHOLIC BEVERAGES – REFUNDS OR CREDITS FOR TAXES; MANNER OF COLLECTING TAXES.

Code Sections 3-2-13, 3-2-14, 3-4-61, and 48-2-35 Amended.

No. 1036 (Senate Bill No. 774).

AN ACT

To amend Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, so as to change the provisions for and limitations upon refunds or credits for taxes on alcoholic beverages; to change provisions relating to the manner of collecting state excise taxes on distilled spirits; to amend Code Section 48-2-35 of the Official Code of Georgia Annotated, relating to refund of taxes, so as to clarify that said Code section does not apply to taxes paid or stamps purchased for alcoholic beverages; to provide an effective date; to provide for applicability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, is amended by striking Code Section 3-2-13, relating to the issuance of refunds or credits for taxes paid on alcoholic beverages or stamps purchased, and inserting in lieu thereof a new Code Section 3-2-13 to read as follows:

"3-2-13. (a) Notwithstanding any other provision of this title or any other title to the contrary, the provisions of this article shall provide the exclusive remedy and procedure for seeking and obtaining any and all refunds or credits for taxes paid on alcoholic beverages and for stamps purchased in payment of taxes on alcoholic beverages. No refund in the form of a disbursement from the state treasury shall be allowed for any such taxes or payments. No credit shall be allowed for any such taxes or payments unless expressly authorized by this article.

(b) The commissioner may issue credits for taxes paid by or due from a wholesaler or, in the case of taxes on distilled spirits, may issue credits for stamps purchased by a manufacturer, distiller, or wholesaler when it is shown to the commissioner's satisfaction that any of the following events have occurred:

(1) Alcoholic beverages have been received by the wholesaler through an error in shipment and the alcoholic beverages are returned to the shipper prior to any sale by the wholesaler in this state;

(2) Alcoholic beverages ordered by the wholesaler have been destroyed in transit prior to entry into the wholesaler's warehouse or storage area;

(3) Alcoholic beverages which are unfit for consumption upon receipt have been received by the wholesaler and the alcoholic beverages are returned to the shipper or destroyed prior to any sale by the wholesaler in this state;

(4) Alcoholic beverages have been destroyed while in the possession of a wholesaler within the state by an act of God, such as fire, flood, lightning, wind, or other natural calamity;

(5) Wines have been sold by the wholesaler for delivery and consumption outside the state, provided the sale and delivery shall in all respects comply with the requirements of Code Section 3-6-26.1; or

(6) Taxes were paid or stamps were purchased under a statute expressly held to be unconstitutional by a court of last resort and the payments were made under protest and the ground of the protest was the same as the basis for the ruling of unconstitutionality by the court of last resort.

(c) No person shall receive a credit for taxes paid or stamps purchased in any case where an amount equal to the amount of taxes paid or to the cost of the stamps purchased has been charged to or paid by any purchaser of the person seeking a refund or credit. When an applicant is issued a credit for taxes paid or stamps purchased, in every case where an amount equal to the amount of taxes paid or cost of the stamps purchased has been charged to or paid by any purchaser of the applicant, the applicant shall refund or credit to the purchaser or customer an amount equal to the credit allowed by the commissioner."

Section 2. Said title is further amended by striking Code Section 3-2-14, relating to limitations on refunds, and inserting in lieu thereof a new Code Section 3-2-14 to read as follows:

"3-2-14. (a) No credit for taxes paid on alcoholic beverages or for stamps purchased in payment of taxes on alcoholic beverages shall be allowed unless an application for credit is filed with the commissioner within 90 days from the date payment is received by the commissioner. If, in the opinion of the commissioner, an application for credit of taxes paid pursuant to this title contains a false statement, the application

shall be denied. When an applicant is indebted to the state or an applicant is in violation of this title, the commissioner shall decline to approve the credit until the applicant has complied with the laws of this state. In no event shall interest be allowed on any refund or credit for taxes paid on alcoholic beverages or for stamps purchased in payment of taxes on alcoholic beverages. Nothing contained in this Code section shall be construed so as to allow for a credit or refund of any license fee lawfully due or paid under this title.

(b) Each application for credit shall be filed in writing in the form and containing such information as the commissioner may reasonably require. The commissioner or his delegate shall consider information contained in the application, together with such other information as may be available, and shall approve or disapprove the application and notify the applicant of his action. Any applicant whose claim is denied by the commissioner or his delegate or whose claim is not decided by the commissioner or his delegate within one year from the date of filing the claim shall have the right to bring an action for a credit in the Superior Court of Fulton County. No action or proceeding for the recovery of a credit shall be commenced before the expiration of one year from the date of filing the application unless the commissioner or his delegate renders a decision on the application within that time, nor shall any action or proceeding be commenced after the occurrence of the earlier of (1) the expiration of one year from the date the claim is denied, or (2) the expiration of two years from the date the application was filed. The time for filing an action for the recovery of a credit may be extended for such period as may be agreed upon in writing between the applicant and the commissioner during the period authorized for bringing an action or any extension thereof. In the event any application is approved and the taxpayer has not paid

other state taxes which have become due, the commissioner may set off the unpaid taxes against the credit. When the setoff authorized in this Code section is exercised, the credit shall be deemed granted and the amount of the setoff shall be considered for all purposes as a payment toward the particular tax debt which is being set off. Any excess credit properly allowable under this Article which remains after the setoff has been applied may be credited to the taxpayer."

Section 3. Said title is further amended by striking Code Section 3-4-61, relating to the collection of state excise taxes on distilled spirits, which reads as follows:

"3-4-61. (a) Except as may otherwise be authorized in this title, the state excise taxes imposed by this part shall be collected in the following manner:

(1) The commissioner shall prescribe suitable stamps in proper denominations denoting the payment of taxes imposed by this part, and the tax provided shall be administered and collected by means of adhesive stamps lithographed with an intricate geometric design on safety paper or in a manner as may be prescribed by the commissioner;

(2) Before shipment or delivery to any retailer, every manufacturer or wholesaler shall affix or cause to be affixed to each bottle or container of distilled spirits a stamp indicating the payment of the proper amount of tax; and

(3) All manufacturers, distillers, or wholesalers who sell, ship, or deliver to each other shall affix or cause to be affixed to each bottle or container of distilled spirits a stamp indicating the payment of the proper amount of tax.

(b) The commissioner may at his discretion replace mutilated stamps when fully satisfied that the stamps have not been used.",

and inserting in lieu thereof a new Code Section 3-4-61 to read as follows:

"3-4-61. (a) Except as may otherwise be authorized in this title, the state excise taxes imposed by this part shall be paid by the licensed wholesale dealer in distilled spirits.

(b) The taxes shall be paid on or before the tenth day of the month following the calendar month in which the beverages are sold or disposed of within the particular municipality or county by the wholesale dealer.

(c) Each licensee responsible for the payment of the excise tax shall file a report itemizing for the preceding calendar month, by size and type of container, the exact quantities of distilled spirits sold during the month within the state. The licensee shall file the report with the commissioner.

(d) The wholesaler shall remit to the commissioner the tax imposed by the state on the tenth day of the month following the calendar month in which the sales were made.

(e) In order to phase in the reporting system of excise tax payment for distilled spirits and alcohol:

(1) The commissioner shall direct that no later than January 31, 1993, all persons who made excise tax payments in respect of distilled spirits and alcohol sales in the State of Georgia during the calendar year 1992 shall make a one-time deposit equal to the amount of 25 percent of said tax payments. This one-time advance shall be repaid in full by the state in equal semiannual installments over the period of 24

months following August 1, 1993; except that, in the event wholesalers made payments as provided for in this paragraph, the commissioner shall repay such wholesalers in the form of semiannual credits against future tax liability;

(2) On February 1, 1993, or as soon thereafter as practicable, the commissioner shall direct that an inventory be taken of stamped merchandise and tax stamps held by manufacturers, shippers, and wholesalers. The commissioner shall issue refunds to all manufacturers and shippers for the value of tax stamps in their possession on February 1, 1993, to be paid in 12 equal installments beginning on August 1, 1993. The commissioner shall issue tax credits to wholesalers for stamps in inventory on February 1, 1993, which shall be applied as credits against the wholesaler's future tax liability for the 12 month period beginning with the report due on August 10, 1993;

(3) Nothing in this subsection shall be construed to impose an additional excise tax on distilled spirits and alcohol held in inventory by wholesalers and retailers above the excise tax paid prior to February 1, 1993; and

(4) The commissioner shall adopt rules and regulations for the implementation of a reporting method of paying distilled spirits and alcohol excise taxes as well as the elimination of the use of any type of distilled spirits and alcohol stamp. The commissioner shall have full authority to allow credits or make refunds as provided for in this subsection."

Section 4. Code Section 48-2-35 of the Official Code of Georgia Annotated, relating to refunds of taxes, is amended by adding a new subsection (d) at the end thereof to read as follows:

"(d) This Code section shall not apply to taxes paid or stamps purchased for alcoholic beverages pursuant to Title 3."

Section 5. (a) Section 3 of this Act shall become effective February 1, 1993. All other provisions of this Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

(b) With regard to taxes paid and stamps purchased on or after the effective date of this Act, all provisions of this Act shall fully apply.

(c) With regard to taxes paid and stamps purchased prior to the effective date of this Act and with regard to which no application for credit or claim for refund was filed prior to the effective date of this Act, all of the provisions of this Act shall apply, provided that, with regard to payments made less than three years prior to the effective date of this Act, the taxpayer shall have 90 days from the effective date of this Act within which to file with the commissioner the protest and the application for credit provided for by this Act, and provided, further, that no interest shall be allowed on any such taxes paid or stamps purchased.

(d) With regard to taxes paid and stamps purchased prior to the effective date of this Act and with regard to which an application for credit or claim for refund has been filed prior to the effective date of this Act, the law which was in effect at the time the application for credit or claim for refund was filed shall apply, provided that no interest shall be allowed on any such payments, and provided, further, that if a suit for refund or credit has not been filed prior to the effective date of this Act with

regard to any such application or claim, any suit for recovery of a credit pertaining to such a claim or application must be filed within 90 days after the effective date of this Act.

Section 6. All laws and parts of laws in conflict with this Act are repealed.

Approved April 13, 1992.

APPENDIX 7

O.C.G.A. § 3-2-11. Penalties for failure to file reports or returns or to pay tax or fee; procedure for assessment of taxes due, penalties, and interest.

Except as otherwise provided in this title:

(1) When any person required to file a report as provided by this title fails to file the report within the time prescribed, he shall be assessed a penalty of $50.00 for each failure to file.

(2) In the event the commissioner determines, upon inspection of the invoices, books, and records of a licensed wholesale dealer or importer or from any other information obtained by him or his authorized agents, that the licensed wholesale dealer or importer has not paid the proper tax or the proper amount of taxes, the wholesale dealer or importer shall be assessed for the taxes due. After assessment, the person assessed shall be provided with notice and an opportunity for a hearing as provided for contested cases by Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(3) When any person fails to pay any tax or license fee due as provided by this title, the person shall be assessed a penalty the same as that provided for in Code Section 48-2-44.

(4) When any person fails to file a return, files a false or fraudulent return, or when a tax deficiency or any part of a tax deficiency is due to a fraudulent intent to evade any tax imposed or authorized by this title, the person shall be assessed a specific penalty of 50 percent of the tax due.

(5) When any person fails to pay the tax or any part of the tax due as provided by this title, the person shall pay interest on the unpaid tax at the rate of 1 percent per month from the time the tax became due until paid or at the rate specified in Code Section 48-2-40, whichever is greater. Interest shall be computed on a monthly basis for any portion of a month during which payment is delinquent.

(6) All penalties and interest imposed by this title shall be payable to and collected by the commissioner in the same manner as if they were a part of the taxes imposed by this title.

APPENDIX 8

O.C.G.A. § 3-2-13. Issuance of refunds or credits for taxes paid or stamps purchased.

(a) The commissioner may issue credits for taxes paid by or due from a wholesaler or, in the case of taxes on distilled spirits, may issue credits for stamps purchased by a manufacturer, distiller, or wholesaler when it is shown to the commissioner's satisfaction that any of the following events have occurred:

(1) Alcoholic beverages have been received by the wholesaler through an error in shipment and the alcoholic beverages are returned to the shipper prior to any sale by the wholesaler in this state;

(2) Alcoholic beverages ordered by the wholesaler have been destroyed in transit prior to entry into the wholesaler's warehouse or storage area;

(3) Alcoholic beverages which are unfit for consumption upon receipt have been received by the wholesaler and the alcoholic beverages are returned to the shipper or destroyed prior to any sale by the wholesaler in this state;

(4) Alcoholic beverages have been destroyed while in the possession of a wholesaler within the state by an act of God, such as fire, flood, lightning, wind, or other natural calamity;

(5) Wines have been sold by the wholesaler for delivery and consumption outside the state, provided the sale and delivery shall in all respects comply with the requirements of Code Section 3-6-26.1; or

(6) Taxes were paid or stamps were purchased under a statute expressly held to be unconstitutional by a court of last resort and the payments were made

under protest and the ground of the protest was the same as the basis for the ruling of unconstitutionality by the court of last resort.

(b) No person shall receive a credit for taxes paid or stamps purchased in any case where an amount equal to the amount of taxes paid or to the cost of the stamps purchased has been charged to or paid by any purchaser of the person seeking a refund or credit. When an applicant is issued a credit for taxes paid or stamps purchased, in every case where an amount equal to the amount of taxes paid or cost of the stamps purchased has been charged to or paid by any purchaser of the applicant, the applicant shall refund or credit to the purchaser or customer an amount equal to the credit allowed by the commissioner.

(c) In the event that the commissioner issues a credit under this Code section to a person who has or will have insufficient tax liabilities to the State of Georgia against which to offset the credit, the commissioner shall issue a refund to such person for the unusable portion of the credit.

APPENDIX 9

O.C.G.A. § 3-2-14. Limitations on credit; application; action for recovery of credit; setoff of unpaid taxes against credit.

(a) No credit for taxes paid on alcoholic beverages or for stamps purchased in payment of taxes on alcoholic beverages shall be allowed unless an application for credit is filed with the commissioner within 90 days from the date payment is received by the commissioner. If, in the opinion of the commissioner, an application for credit of taxes paid pursuant to this title contains a false statement, the application shall be denied. When an applicant is indebted to the state or an applicant is in violation of this title, the commissioner shall decline to approve the credit until the applicant has complied with the laws of this state. In no event shall interest be allowed on any refund or credit for taxes paid on alcoholic beverages or for stamps purchased in payment of taxes on alcoholic beverages. Nothing contained in this Code section shall be construed so as to allow for a credit or refund of any license fee lawfully due or paid under this title.

(b) Each application for credit shall be filed in writing in the form and containing such information as the commissioner may reasonably require. The commissioner or his delegate shall consider information contained in the application, together with such other information as may be available, and shall approve or disapprove the application and notify the applicant of his action. Any applicant whose claim is denied by the commissioner or his delegate or whose claim is not decided by the commissioner or his delegate within one year from the date of

filing the claim shall have the right to bring an action for a credit in the Superior Court of Fulton County. No action or proceeding for the recovery of a credit shall be commenced before the expiration of one year from the date of filing the application unless the commissioner or his delegate renders a decision on the application within that time, nor shall any action or proceeding be commenced after the occurrence of the earlier of (1) the expiration of one year from the date the claim is denied, or (2) the expiration of two years from the date the application was filed. The time for filing an action for the recovery of a credit may be extended for such period as may be agreed upon in writing between the applicant and the commissioner during the period authorized for bringing an action or any extension thereof. In the event any application is approved and the taxpayer has not paid other state taxes which have become due, the commissioner may set off the unpaid taxes against the credit. When the setoff authorized in this Code section is exercised, the credit shall be deemed granted and the amount of the setoff shall be considered for all purposes as a payment toward the particular tax debt which is being set off. Any excess credit properly allowable under this article which remains after the setoff has been applied may be credited to the taxpayer.

APPENDIX 10

O.C.G.A. § 3-4-61. Payment of tax; report.

(a) Except as may otherwise be authorized in this title, the state excise taxes imposed by this part shall be paid by the licensed wholesale dealer in distilled spirits.

(b) The taxes shall be paid on or before the tenth day of the month following the calendar month in which the beverages are sold or disposed of within the particular municipality or county by the wholesale dealer.

(c) Each licensee responsible for the payment of the excise tax shall file a report itemizing for the preceding calendar month, by size and type of container, the exact quantities of distilled spirits sold during the month within the state. The licensee shall file the report with the commissioner.

(d) The wholesaler shall remit to the commissioner the tax imposed by the state on the tenth day of the month following the calendar month in which the sales were made.

(e) In order to phase in the reporting system of excise tax payment for distilled spirits and alcohol:

(1) The commissioner shall direct that no later than January 31, 1993, all persons who made excise tax payments in respect of distilled spirits and alcohol sales in the State of Georgia during the calendar year 1992 shall make a one-time deposit equal to the amount of 25 percent of said tax payments. This one-time advance shall be repaid in full by the state in equal semiannual installments over the period of 24 months following August 1, 1993; except that, in the event wholesalers made payments as provided for in

this paragraph, the commissioner shall repay such wholesalers in the form of semiannual credits against future tax liability;

(2) On February 1, 1993, or as soon thereafter as practicable, the commissioner shall direct that an inventory be taken of stamped merchandise and tax stamps held by manufacturers, shippers, and wholesalers. The commissioner shall issue refunds to all manufacturers and shippers for the value of tax stamps in their possession on February 1, 1993, to be paid in 12 equal installments beginning on August 1, 1993. The commissioner shall issue tax credits to wholesalers for stamps in inventory on February 1, 1993, which shall be applied as credits against the wholesaler's future tax liability for the 12 month period beginning with the report due on August 10, 1993;

(3) Nothing in this subsection shall be construed to impose an additional excise tax on distilled spirits and alcohol held in inventory by wholesalers and retailers above the excise tax paid prior to February 1, 1993; and

(4) The commissioner shall adopt rules and regulations for the implementation of a reporting method of paying distilled spirits and alcohol excise taxes as well as the elimination of the use of any type of distilled spirits and alcohol stamp. The commissioner shall have full authority to allow credits or make refunds as provided for in this subsection.

APPENDIX 11

O.C.G.A. § 3-4-61 (pre-1992 version). Collection of tax; replacement of mutilated stamps.

(a) Except as may otherwise be authorized in this title, the state excise taxes imposed by this part shall be collected in the following manner:

(1) The commissioner shall prescribe suitable stamps in proper denominations denoting the payment of taxes imposed by this part, and the tax provided shall be administered and collected by means of adhesive stamps lithographed with an intricate geometric design on safety paper or in a manner as may be prescribed by the commissioner;

(2) Before shipment or delivery to any retailer, every manufacturer or wholesaler shall affix or cause to be affixed to each bottle or container of distilled spirits a stamp indicating the payment of the proper amount of tax; and

(3) All manufacturers, distillers, or wholesalers who sell, ship, or deliver to each other shall affix or cause to be affixed to each bottle or container of distilled spirits a stamp indicating the payment of the proper amount of tax.

(b) The commissioner may at his discretion replace mutilated stamps when fully satisfied that the stamps have not been used.

APPENDIX 12

O.C.G.A. § 3-4-152. Submission of labels; designation of sales territories and exclusive wholesale distributors; approval by commissioner.

(a) Every manufacturer or shipper shipping distilled spirits for the first time into the state shall:

(1) Submit to the commissioner one label for each brand of distilled spirits to be shipped for the first time by the manufacturer or shipper into this state;

(2) Designate in the application for registration the sales territories for each of its brands sold in this state; and

(3) Name one licensed wholesaler in each territory who shall be the exclusive distributor of the brand within the territory.

(b) Designations of wholesalers and wholesalers' territories as provided in this Code section shall be initially approved by the commissioner and shall not be changed or initially disapproved except for cause. The commissioner shall determine cause after a hearing under regulations promulgated by the commissioner for such purposes.

APPENDIX 13

O.C.G.A. § 5-6-35. Cases requiring application for appeal; contents, filing, and service of application; exhibits; response by opposing party; issuance of appellate court order regarding appeal; procedure; supersedeas; jurisdiction of appeal.

(a) Appeals in the following cases shall be taken as provided in this Code section:

(1) Appeals from decisions of the superior courts reviewing decisions of the State Board of Workers' Compensation, the State Board of Education, auditors, state and local administrative agencies, and lower courts by certiorari or de novo proceedings; provided, however, that this provision shall not apply to decisions of the Public Service Commission and probate courts and to cases involving ad valorem taxes and condemnations;

(2) Appeals from judgments or orders in divorce, alimony, child custody, and other domestic relations cases including, but not limited to, granting or refusing a divorce or temporary or permanent alimony, awarding or refusing to change child custody, or holding or declining to hold persons in contempt of such alimony or child custody judgment or orders;

(3) Appeals from cases involving distress or dispossessory warrants in which the only issue to be resolved is the amount of rent due and such amount is $2,500.00 or less;

(4) Appeals from cases involving garnishment or attachment, except as provided in paragraph (5) of subsection (a) of Code Section 5-6-34;

(5) Appeals from orders revoking probation;

(6) Appeals in all actions for damages in which the judgment is $10,000.00 or less;

(7) Appeals, when separate from an original appeal, from the denial of an extraordinary motion for new trial;

(8) Appeals from orders under subsection (d) of Code Section 9-11-60 denying a motion to set aside a judgment or under subsection (e) of Code Section 9-11-60 denying relief upon a complaint in equity to set aside a judgment;

(9) Appeals from orders granting or denying temporary restraining orders;

(10) Appeals from awards of attorney's fees or expenses of litigation under Code Section 9-15-14; and

(11) Appeals from decisions of the state courts reviewing decisions of the magistrate courts by de novo proceedings so long as the subject matter is not otherwise subject to a right of direct appeal.

(b) All appeals taken in cases specified in subsection (a) of this Code section shall be by application in the nature of a petition enumerating the errors to be urged on appeal and stating why the appellate court has jurisdiction. The application shall specify the order or judgment being appealed and, if the order or judgment is interlocutory, the application shall set forth, in addition to the enumeration of errors to be urged, the need for interlocutory appellate review.

(c) The applicant shall include as exhibits to the petition a copy of the order or judgment being appealed and should include a copy of the petition or motion which led directly to the order or judgment being

appealed and a copy of any responses to the petition or motion. An applicant may include copies of such other parts of the record or transcript as he deems appropriate. No certification of such copies by the clerk of the trial court shall be necessary in conjunction with the application.

(d) The application shall be filed with the clerk of the Supreme Court or the Court of Appeals within 30 days of the entry of the order, decision, or judgment complained of and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties as provided by law, except that the service shall be perfected at or before the filing of the application. When a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the application shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.

(e) The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The response may point out that the decision of the trial court was not error, or that the enumeration of error cannot be considered on appeal for lack of a transcript of evidence or for other reasons.

(f) The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 30 days of the date on which the application was filed.

(g) Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, shall file a notice of appeal as provided by law. The procedure thereafter shall be the same as in other appeals.

(h) The filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as supersedeas.

(i) This Code section shall not affect Code Section 9-14-52, relating to practice as to appeals in certain habeas corpus cases.

(j) When an appeal in a case enumerated in subsection (a) of Code Section 5-6-34, but not in subsection (a) of this Code section, is initiated by filing an otherwise timely application for permission to appeal pursuant to subsection (b) of this Code section without also filing a timely notice of appeal, the appellate court shall have jurisdiction to decide the case and shall grant the application. Thereafter the appeal shall proceed as provided in subsection (g) of this Code section.

APPENDIX 14

O.C.G.A. § 9-3-33. Injuries to the person; injuries to reputation; loss of consortium; exception.

Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year after the right of action accrues, and except for actions for injuries to the person involving loss of consortium, which shall be brought within four years after the right of action accrues.

APPENDIX 15

O.C.G.A. § 9-11-26(b)(1) & (3). General provisions governing discovery.

(b) *Scope of discovery.* Unless otherwise limited by order of the court in accordance with this chapter, the scope of discovery is as follows:

(1) IN GENERAL. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence;

. . . .

(3) TRIAL PREPARATION; MATERIALS. Subject to paragraph (4) of this subsection, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this subsection and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of

such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. Paragraph (4) of subsection (a) of Code Section 9-11-37 applies to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a "statement previously made" is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded; and

APPENDIX 16

O.C.G.A. § 9-11-56(e). Summary judgment.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in the evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. All affidavits shall be filed with the court and copies thereof shall be served on the opposing parties. When a motion for summary judgment is made and supported as provided in this Code section, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

APPENDIX 17

O.C.G.A. § 24-9-21(2). Confidentiality of certain communications.

There are certain admissions and communications excluded on grounds of public policy. Among these are:

. . . .

(2) Communications between attorney and client;

APPENDIX 18

O.C.G.A. § 24-9-24. Client's communications to attorney privileged.

Communications to any attorney or to his employee to be transmitted to the attorney pending his employment or in anticipation thereof shall never be heard by the court. The attorney shall not disclose the advice or counsel he may give to his client, nor produce or deliver up title deeds or other papers, except evidences of debt left in his possession by his client. This Code section shall not exclude the attorney as a witness to any facts which may transpire in connection with his employment.

APPENDIX 19

O.C.G.A. § 24-9-25. When attorney may testify for or against client.

No attorney shall be competent or compellable to testify for or against his client to any matter or thing, the knowledge of which he may have acquired from his client by virtue of his employment as attorney or by reason of the anticipated employment of him as attorney. However, an attorney shall be both competent and compellable to testify for or against his client as to any matter or thing, the knowledge of which he may have acquired in any other manner.

APPENDIX 20

19 U.S.C. § 3512(b)(2)(A) & (c). Relationship of the Agreements to United States law and State law

(b) Relationship of Agreements to State law.

. . . .

(2) Legal challenge.

(A) In general. No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid.

. . . .

(c) Effect of Agreement with respect to private remedies.

(1) Limitations. No person other than the United States –

(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or

(B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

(2) Intent of Congress. It is the intention of the Congress through paragraph (1) to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof or raising any defense to the application of State law under or in conjunction with any of the Uruguay Round Agreements –

(A) on the basis of a judgment obtained by the United States in an action brought under any such agreement; or

(B) on any other basis.
